Supreme Court, U.S.
FILED
FEB 18 1994
OFFICE OF THE CLERK

No. 93-1181

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

COURT OF COMMON PLEAS OF LORAIN COUNTY,

Petitioner

VS.

JOHN MALINOVSKY,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1) What is the role of the Federal District Court in a habeas corpus action in examining questions of law decided by the Supreme Court of Ohio?

2) Is retrial barred by the Double Jeopardy Clause when the trial court sua sponte dismisses an action for want of prosecution, without defendant's consent, as a result of the state refusing to go forward or rest after defendant's objection to the introduction of hearsay evidence is sustained?

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STATEMENT OF THE CASE

John Malinovsky (hereinafter referred to as "respondent"), formerly Chief of Police of Lorain, Ohio, was indicted by the Lorain County, Ohio Grand Jury and charged with extortion, perjury, obstructing official business and interfering with civil rights under the statutes of the State of Ohio. On June 6, 1989, a jury was impaneled and the case proceeded to trial.

The prosecution intended to prove its case by introducing out-of-court statements of Sergeant Wayne Long of the Lorain Police Department. These statements, consisting of conversations between Long and two fire inspectors, including one tape-recorded telephone conversation, which allegedly included threats made by Long to the fire inspectors. The state argued that Long made these threats at the behest of Chief Malinovsky. The state chose not to call Wayne Long, although he was available as a witness. Long had consistently denied that Chief Malinovsky had ordered him to commit extortion.

The admissibility of these out-of-court statements was disputed by the parties. The defense argued that the opportunity to confront and cross-examine the declarant, Long, was critical to establish Long's intent and whether or not Long was acting on behalf of Chief Malinovsky. The defendant objected to the introduction of the statements as hearsay.

The prosecutor had anticipated the

problem of admitting into evidence this hearsay evidence. He attempted to force the defendant to file a pretrial motion to suppress the hearsay, arguing that this would afford him an opportunity to file a pretrial appeal pursuant to Ohio Crim. R. 12(J) if the motion were granted. However, the defendnat did not file a pretrial motion to suppress the hearsay evidence reasoning that under Ohio law, an evidentiary objection to the introduction of hearsay is not properly addressed by a motion to suppress and is not properly made pretrial.

Ohio Criminal Rule 12(B)(3) provides that a motion to suppress evidence may be filed only "on the ground that [the evidence] was illegally obtained." Defendant's objections to the evidence were based on the grounds that the evidence was inadmissible hearsay, not on the grounds that the evidence had been illegally obtained. Under Ohio law, a pretrial ruling on a motion in limine to exclude hearsay would not have been a final ruling on the issue of admissibility and, therefore, would not have been appealable.

After two days of trial, the state attempted to introduce the hearsay on the theory that the statements were made by a co-conspirator during the course of and in furtherance of the conspiracy. Such out-of-court declarations are admissible as admissions by a party pursuant to Ohio Evid. R. 801(D)(2)(e) only if the proponent establishes the existence of the conspiracy by independent evidence.

The trial court sustained the

defendant's objection to the introduction of Long's out-of-court statements. The trial court held that the state had not met its burden of establishing the existence of the conspiracy by independent evidence. The court stated that it would reconsider its ruling if the state could prove conspiracy by independent evidence. Instead, the prosecutor filed, midtrial, a notice of appeal and refused to either proceed with the trial or rest. The defendant moved the court for an acquittal pursuant to Ohio Crim. R. 29.

Ohio Criminal Rule 12(J) provides that a prosecutor may appeal from the granting of a motion to suppress evidence or a motion to return seized property. Both of these motions are pretrial motions. Prior to the Ohio Supreme Court's ruling in State v. Malinovsky, Ohio Criminal Rule 12(J) had not been used to take a midtrial appeal.

The trial court declared the notice of appeal a nullity since its evidentiary ruling was merely interlocutory and not a final appealable order. It overruled the defendant's motion for acquittal and ordered the state to proceed with its case. The state called one more witness, then refused to either rest or offer additional evidence. The trial court then, sua sponte, dismissed the case for want of prosecution and discharged the jury. The defendant objected to the dismissal. Lorain County Court of Common Pleas Tr. at 209-10.

The Court of Appeals affirmed the trial court's dismissal, finding that the state

did not take a proper appeal on the interlocutory ruling and that the appeal violated the Double Jeopardy Clause of the Fifth Amendment. Decision and Journal Entry of the Court of Appeals, Lorain County, Ohio, 12/27/89. The Ohio Supreme Court reversed, holding that the state could appeal a midtrial evidentiary ruling pursuant to Ohio Criminal Rule 12(J) and Ohio Revised Code Sec. 2945.67. The Ohio Supreme Court also held that the interlocutory appeal did not violate the Double Jeopardy Clause. The Ohio Supreme Court then remanded the case to the Court of Appeals to determine the correctness of the evidentiary ruling. State v. Malinovsky, 60 Ohio St. 3d 20, 563 N.E.2d 22 (1991, cert. denied (1991), ___ U.S.___, 112 S. Ct. 582, 116 L.Ed 2d 607.

The defendant filed a petition for writ of certiorari to the United States Supreme Court on the Double Jeopardy issue, which was denied. The Ohio Court of Appeals then reversed the trial court's ruling and remanded for retrial. Petitioner filed a Memorandum in Support of Jurisdiction to the Ohio Supreme Court. The Ohio Supreme Court sustained the state's motion to dismiss on February 19, 1992.

Petitioner filed a Petition for Writ of Habeas Corpus February 20, 1992 in the United States District Court, Northern District of Ohio. The Magistrate Judge recommended granting the petition April 29, 1992. Petitioner filed a response to the objections May 14, 1992. Judge Ann Aldrich granted the Petition for Writ of Habeas Corpus June 12, 1992. The State of Ohio filed a notice of appeal to the Sixth

Circuit Court of Appeals July 2, 1992.

The parties each filed briefs and argued the issues before the Sixth Circuit Court of Appeals. In a well-reasoned opinion, the Sixth Circuit affirmed the District Court by decision filed October 25, 1993. Petitioner, Court of Common Pleas of Lorain County, filed a Petition for writ of certiorari to the U.S. Supreme Court January 21, 1994, which Respondent, John Malinovsky, now opposes.

LAW AND ARGUMENT

I. The Sixth Circuit Court of Appeals properly held that the Double Jeopardy Clause bars Malinovsky's retrial and that the United States District Court properly granted Malinovsky's writ of habeas corpus.

A. In reviewing a petition for writ of habeas corpus, a reviewing court may properly review state court conclusions of law and state court applications of law to the facts of a particular case.

State court finding of fact are entitled to a presumption of correctness on habeas corpus review. 28 U.S.C. Sec. 2254. However, this presumption of correctness is limited to factual determinations and does not attach to state court conclusions of law, Marshall v. Lonberger, 103 S. Ct. 843, 849 (1983), or to state court applications of law to the facts of individual cases. Sumner v. Mata, 449 U.S. 539, 544 (1980).

Like the petitioner in the instant case, the appellant in Pryor v. Rose "argue[d] that since the petitioner does not rely on any of the exceptions listed in 28 U.S.C. Sec. 2254(d), the quoted statement is a finding of fact which is binding on this court." 724 F.2d 525, 528 (1984). The court rejected this argument.

In this instant case, the facts are undisputed: after two days of trial, the defendant objected to the introduction of

hearsay evidence. The trial court sustained this objection. The state filed a midtrial notice of appeal and thereafter, refused to go forward or rest. As a result, the trial court dismissed the action for want of prosecution over the defendant's objection and after overruling defendant's motion of acquittal. The trial court then discharged the jury and released them from any previous admonitions.

The findings that are disputed are the Ohio Supreme Court's application of law to the facts of the case and that courts' erroneous analysis of federal constitutional law. Specifically, the Ohio Supreme Court's characterizations of the respondent's evidentiary objection as a consent or waiver of his constitutional rights is a decision of law, it is not a finding of fact. The Ohio Supreme Court's decision does not change the underlying fact that the respondent objected to hearsay evidence. However, the decision does change the legal ramifications of this fact. Thus, it is abundantly clear the petitioner's argument that both the Sixth Circuit Court of Appeals and the District Court did not presume correct the Ohio Supreme Court's "findings of fact" is without merit. It is clear that the Ohio Supreme Court's application of the law to the facts of the case were not entitled to a presumption of correctness, and therefore the reviewing courts below correctly examined the issues on habeas corpus review.

Additionally, petitioner's argument that the Ohio Supreme Court's decision was

merely a procedural determination and entitled to deference is without merit. Moreover, petitioner's reliance on Duffel v. Dutton, 785 F.2d 131 (6th Cir., 1986), to support this assertion is misplaced.

A state is free to regulate the procedure of its courts unless, in so doing, it offends a fundamental right. Snyder v. Massachusetts, 291 U.S. 97, 105 (1933). Although Ohio Criminal Rule 12 and Ohio Revised Code Sec 2945.67, which grant the state limited appellate rights, are not limited to pretrial situations on their face, they are limited by federal constitutional law under the Double Jeopardy Clause. The Fifth Amendment provision against double jeopardy is binding on the states through the Fourteenth Amendment, and federal standards apply. Benton v. Mayland, 395 U.S. 784, 89 S. Ct. 2056 (1969). Thus, the Ohio legislature may not ignore double jeopardy limitations on the prosecutor's right to appeal.

As such, and assuming for the sake of argument that the Ohio Legislature has truly "sought to alleviate the disparity in the ability to appeal rulings in criminal cases" as the state asserts, the legislature may not ignore the constitutional limitations placed on such appellate rights by the Double Jeopardy Clause and the United States Supreme Court. Whatever the implications of the legislature's and the Ohio Supreme Court's actions, they are not merely procedural; such actions necessarily implicate fundamental constitutional rights. Notably, the pertinent statute, O.R.C.

Sec. 2945.67, and court rule, Ohio Crim. R. 12(J), make no reference to midtrial appeals and do not provide procedures to protect the defendant's right against double jeopardy.

Most importantly, the respondent's double jeopardy rights were violated. The petitioner simply failed to adduce sufficient evidence at trial to satisfy the judge of the existence of a conspiracy by independent evidence as required by Ohio Evid. R. 801(D)(2)(e). When faced with the exclusion of these out-of-court statements, the petitioner filed a notice of appeal pursuant to Ohio Crim. R. 12(J) claiming that the evidentiary ruling amounted to a suppression of critical evidence. In effect, the state attempted to perfect a second opportunity to convict the respondent, thereby subjecting him to embarrassment, expense, ordeal, anxiety and enhanced possibility of being found guilty though innocent. Green v. United States, 355 U.S. 184, 187-188, 78 S. Ct. 221, 223 (1957).

This "policy" of midtrial appeal, as advanced by the petitioner, where, as in this case, the trial court dismissed the case and discharged the jury, clearly conflicts with the respondent's right not "to be subject for the same offense to be twice put in jeopardy of life or limb" as set forth in the Fifth Amendment of the United States Constitution.

On this issue, the petitioner cites Duffel v. Dutton, 875 F.2d 131 (6th Cir., 1986), in support of his argument that the Ohio Supreme Court's ruling was on a

procedural matter binding upon the federal court. In Duffel, the state court of appeals reversed a conviction for lack of evidence but further held that retrial was not barred since the trial court erroneously excluded evidence offered by the state. Duffle is fundamentally distinct from the case now before the Court since, in Duffel, the case went to the jury and resulted in a conviction. The defendant appealed and was successful in having his conviction reversed. The petitioner's argument that double jeopardy does not prohibit a retrial where the state was prevented from offering evidence is limited to circumstances as in Duffel where a defendant faces a retrial after he seeks to have his conviction reversed. The Duffel court recognized that, except for a narrow exception, a defendant who successfully appeals a conviction is subject to retrial. In contrast, the respondent, through the action of the trial court and the petitioner, lost his opportunity to have his chosen tribunal find him not guilty of the criminal charges alleged in the indictment.

The issue before the court is a matter of federal constitutional law and involves a substantive constitutional right. A federal court in habeas corpus proceedings must not give deference and acceptance to a state procedure allowing a midtrial appeal when that procedure violated the respondent's rights under the Double Jeopardy Clause. Pryor v. Rose, supra; Smith v. Sowder, 848 F.2d 135 (6th Cir., 1988).

Thus, the reviewing courts below properly reviewed the Ohio Supreme Court's findings and found them in violation of the Double Jeopardy Clause.

B. The Double Jeopardy clause bars retrial when a trial court sua sponte dismisses an action over defendant's objection after the prosecution files a midtrial appeal from an evidentiary ruling which sustained defendant's objection to the introduction of hearsay evidence.

Petitioner's repeated attempts to characterize respondent's objection to hearsay evidence as a "Motion to Suppress," does not change the reality of what actually happened; the trial court dismissed the action because the state refused to go forward or rest after filing its midtrial appeal.

Moreover, petitioner's argument that retrial should not be barred because the trial court did not have jurisdiction to act when it dismissed the jury is also without merit. A defendant does not waive double jeopardy protections when the actions of the prosecutor or the court, acting sua sponte, are the cause of a mistrial unless the state can show manifest necessity for the mistrial. A fundamental principle of double jeopardy protection is that retrial following an aborted trial without consent of the defendant before verdict is reached is barred unless the prosecution can justify manifest necessity for the mistrial order. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580; 6 L. Ed 165 (1924); Arizona v. Washington, 434 U.S. 497, 503; 98 S. Ct. 824, 829 (1978); Glover v. McMackin, 950 F.2d 1236 (6th Cir., 1991). Manifest

necessity was clearly lacking in the instant case, and the petitioner has failed to justify the mistrial by a showing of manifest necessity.

The Sixth Circuit majority opinion discussed this issue in its reasoning:

> But, as noted in the district judge's memorandum and order, while it may technically be true that the trial court was without jurisdiction, the state ignores the fact that the trial court did in fact continue to act and the defendant's constitutional rights were implicated by those actions. Even if he should not have done so, [the jury was] dismissed from further service on this case. At a minimum, the trial court probably did have jurisdiction to handle administrative matters pending the appeal, such as how to deal with the jury. Malinovsky v. Court of Common Pleas, No 93-2691 at 17.

In fact, the trial court did have jurisdiction to handle such matters as the majority recognized:

> Ohio law recognizes that the trial court is not completely divested of jurisdiction once an appeal has been perfected. In general, the trial court retains jurisdiction over those matters not inconsistent with the appellate court proceedings. 4 O.Jur.3d, Appellate Review Sec. 246 (1978); Yee v. Erie County Sheriff's Dept., 553 NE2d 1354, 1355 (Ohio 1990); In re Kurtzhalz, 48 NE2d 657,

659 (Ohio 1943).

In the case of appeals on grounds of double jeopardy, the courts almost uniformly hold that when an appeal is taken, the trial court retains jurisdiction to decide whether the appeal is frivolous, and if it determines that it is, to proceed to trial. See Stewart v. Donges, 915 F2d 572, 574 (10th Cir. 1990) for a good discussion.

The situation here is analogous. There was no prior precedent for taking an appeal from an evidentiary ruling during trial. The Supreme Court of Ohio acknowledged as much. The trial court here treated the appeal as frivolous. As it turned out, the trial court was in error, but in the constitutional sense, it did not act in the complete absence of jurisdiction. The trial judge was in control of the jury, and he improperly discharged it. That discharge cannot be attributed to the defendant.

Id at 17, FN6.

A fundamental principal of double jeopardy protection is that retrial following an aborted trial without consent of the defendant before verdict is reached is barred unless the prosecution can justify manifest necessity for the mistrial order. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580; 6 L. Ed 165 (1924); Arizona v. Washington, 434 U.S. 497, 503; 98 S. Ct. 824, 829 (1978); Glover v. McMackin, 950 F.2d 1236 (6th Cir., 1991). Manifest necessity was clearly lacking in the instant case, and

the petitioner has failed to justify the mistrial by a showing of manifest necessity. As the Sixth Circuit Court noted in its reasoning, the Petitioner apparently has conceded that the trial court acted unjustifiably: "[Malinovsky] should not 'be permitted to profit from the trial court's mishandling of the situation [Malinovsky] consciously elected to cause.'" Malinovsky v. Court of Common Pleas, No. 92-3691 at 15.

The reviewing courts correctly determined that retrial of the respondent in this case would violate his right to have his case brought to a final verdict after his trial began. This right was discussed in United States v. Jorn, 400 U.S. 470, 479 91 S. Ct. 547, 554 (1971):

> The Fifth Amendment's prohibition against placing a defendant 'twice in jeopardy' represent a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power of government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedure which the Constitution establishes for the conduct of a criminal trial and society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws; both of these considerations are expressed in

Green v. United States, 355 U.S. 184, 187-188, 78 S. Ct. 221, 223, 2 L. Ed 199 (1957), where the court noted that the policy underlying this provision 'is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'

The respondent did not consent to having the action dismissed; in fact, respondent objected to the dismissal. (R. 23: Memorandum of Decision and Order at P. 8). Further, the respondent's objection to the admission of hearsay evidence cannot be deemed a consent to mistrial. As the court stated in Lovinger v. Circuit Court of the 19th Judicial Circuit, 845 F.2d 739, 744 (7th Cir., 1988):

> We cannot presume that the defense deems itself hurt rather than helped by such an occurrence, and on that basis converts an objection into a mistrial motion. Further, were we to construe consent to a mistrial so broadly, the state would routinely gain a second chance to prosecute without meeting the well established 'manifest necessity' standard. Nearly every objection or complaint by a defendant regarding the fairness of the proceeding could be construed under such a far-reaching

> interpretation as a motion for mistrial and therefore a waiver of the protection of the double jeopardy clause. We will not search for consent where it is not affirmatively given and clearly evident on the record.

See also Glover v., McMackin, 950 F.2d 1236, 1240 (6th Cir., 1991); Jones v. Hagg, 732 F.2d 53, 57 (6th Cir., 1984).

Consent to mistrial contemplates a significant level of participation by the defendant in terminating a trial prior to a determination on its merits. United States v. Dahlstrum, 655 F.2d 971, 975 (9th Cir., 1981). The Dahlstrum court described this defense participation in several ways: The defendant "elected to seek termination," "made voluntary choice," "successfully avoided [a decision on the merits] . . . by persuading the trial court to dismiss," "undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury," "obtained[ed] the termination", and"[sought] to have the trial terminated." Id at 975.

The reviewing courts below correctly concluded that respondent did not persuade the trial court to dismiss and, in fact, did just the opposite by moving for acquittal and objecting to the dismissal (R. 23: Memorandum of Decision and Order at P. 21-24). Respondent merely objected to the introduction of hearsay testimony. He sought a final verdict by submission of the case to the jury.

The respondent wanted the case to be submitted to the judge or jury for final verdict because the prosecution, after two days of trial, had presented virtually no evidence supporting criminal involvement by the respondent. The alleged co-conspirator, Wayne Long, was available but was not called by the state because, despite many inducements offered by the prosecution, Long would not perjure himself and testify untruthfully that the respondent, Chief Malinovsky, ordered him to threaten the fire inspectors. Thus, the trial court's ruling, sustaining the respondent's objection and excluding Long's out-of-court statements, left the state with no evidence that the respondent had committed a crime. The midtrial appeal was an attempt by the petitioner, not Malinovsky, to abort the trial prior to final verdict.

The petitioner claims that the respondent consciously manipulated away the petitioner's rights by refusing to file a pretrial motion to suppress the out-of-court declaration of Wayne Long. To the contrary, the respondent did not file a pretrial motion to suppress evidence because he had no claim that evidence was illegally obtained by the state. The admissibility of the disputed evidence was determined by application of Ohio Evid. R. 801(D)(2)(e) which simply codifies a common law exception to the general rule that hearsay is not admissible. While the controversy over the admissibility of this evidence is not directly relevant to double jeopardy (the Ohio Supreme Court did not rule on this issue when it held that further

proceedings were not barred by the Double jeopardy Clause), the petitioner essentially claims that the respondent unethically and in bad faith manipulated away the prosecutor's opportunity to appeal this ruling and, thus, has waived the right to object to a retrial following the midtrial appeal.

Under Ohio law, objections to the admission of evidence based on the rules of evidence are not made pretrial. A motion in limine will merely result in a tentative ruling and not a final order of admissibility. State v. Spahr, 47 Ohio App. 2d 221, 353 N.E.2d 624 (Shelby, 1976). A final ruling on the admissibility of evidence founded on the application of the rules of evidence cannot be made pretrial. State v. Grubb, 28 Ohio St. 3d 199, 503 N.E. 2d 142 (1986).

Ohio Criminal Rule 12(B)(3) provides that motions to suppress evidence based on the ground that the evidence was illegally obtained must be made pretrial. A defendant cannot manipulate away the prosecutor's right to appeal under Ohio Crim. R. 12(J) (which is limited to the granting of a motion to suppress or to return property) since the defendant must made such an objection to admission of evidence by pretrial motion or it is waived.

The petitioner argues that the case of State v. Davidson, 17 Ohio St. 3d 132, 477 N.E.2d 1141 (1985), stands for the proposition that even a defendant's midtrial objection to the admission of

evidence, founded on the rules of evidence, is a motion to suppress for purposes of Ohio Crim. R. 12(J) if the state certifies that the ruling effectively destroys its case. In fact, Davidson actually held that a pretrial motion, inaccurately labeled a motion in limine, was a motion to suppress for purpose of Ohio Crim. R. 12(J) when it sought the exclusion of evidence on the ground it was illegally obtained.

The respondent, after considering Ohio Crim. R. 12(B)(3), reasonably refused to file a pretrial motion on the admissibility of this evidence. Thus, the respondent did not act in bad faith and did not waive his right to object to a retrial on the grounds of double jeopardy or consent to the mistrial by objecting to the admission of hearsay at trial. Lovinger, supra, at 744.

When the trial court declares a mistrial without the consent of the defendant, a retrial is barred absent "manifest necessity for the mistrial." Untied States v. Perez, 2 U.S. (9 Wheat.) 579, 580, 6 L Ed 165 (1924); Arizona v. Washington, 434 U.S. 497, 503, 98 S. Ct. 824, 829 (1978); Davis v. United States, U.S., 110 S. Ct. 70 (1989). In determining whether a trial court properly declared a mistrial because of trial error, the reviewing court must determine:

> Whether the trial judge heard opinions of the parties about the propriety of the mistrial, considered the alternatives to mistrial and

> chose the alternative least harmful to the defendant's rights, acted deliberately instead of abruptly, and properly determined that the defendant would benefit from declaration of mistrial. United States v. Bates, 917 F.2d 388, 395-396 (9th Cir., 1990).

The trial court must consider alternatives, such as a continuance, and "weigh their consequences against the vital concerns of not being twice placed in jeopardy." Glover v. McMackin, 950 F.2d at 1242. Morever, the Supreme Court has stated that:

> in passing on the propriety of a declaration of mistrial granted at the behest of the prosecution or the court's own motion, this Court has balanced the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him,. . . against the public interest in insuring that justice is meted out to offenders.

United States v. Scott, 437 U.S. 87, 92 (1978) (quoting Downum v. United States, 372 U.S. 734, 736 (1963)). Under this balancing, the prosecutor has the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate the 'manifest necessity' for any mistrial declared over the objection of the defendant." Arizona v. Washington, 434 U.S. 497, 505 (1978) (footnotes omitted).

Petitioner has not demonstrated or attempted to demonstrate the manifest necessity for the mistrial. Moreover, Petitioner's argument ignores the respondent's "valued right to have a trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689 (1949); Crist v. Bretz, 437 U.S. 28 (1978). The reviewing courts' opinions correctly recognized that a criminal defendant has a constitutional right to retain his chosen jury and that respondent irretrievable lost his chosen jury when the trial court dismissed respondents first chosen trier of fact. (R23: memorandum of Decision and Order at P. 20-21).

The prosecutor argues that the jury could be recalled, however, the record clearly indicates that the court dismissed the jury, releasing them from its admonitions. (R. 23: Memorandum of Decision and Order at P. 20-21, quoting Lorain County Court of common Pleas Transcript of Proceedings at P. 209-211). The record further indicates that there was not an expressed intent or procedure to recall the jury because the judge terminated the trial and did not continue the case.

The record clearly establishes that the trial court did not consider alternatives to dismissing the case and did not consider the effect of a dismissal on the respondent's rights under the Double Jeopardy Clause. The trial court could have stayed the trial during the course of the prosecutor's expedited appeal or he could have deemed the state to have

rested. Either alternative to mistrial would have protected the respondent's right to have concluded his "confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." United States v. Jorn, 400 U.S. 470, 486, 91 S. Ct. 547, 558 (1971). However, as the reviewing courts below correctly concluded, under the circumstances of the instant case, the Double Jeopardy Clause bars respondent's retrial.

CONCLUSION

This case falls squarely within established and recognized double jeopardy case law prohibiting retrial under the circumstances presented here. Further, this case does not present basis upon which to limit habeas corpus review as the issues considered are not based on state court factual determinations but rather the Ohio Supreme Court's application of the law to the facts of this case. A reviewing court on habeas corpus clearly may interpret such an application when considering whether double jeopardy prohibits retrial.

Moreover, double jeopardy case law, as set forth herein, clearly establishes that a defendant must explicitly waive his double jeopardy protections by affirmatively moving for mistrial. A court's sua sponte actions are not chargeable to a defendant as a waiver. Here, the state caused the mistrial by refusing to go forward or rest. Further, the court dismissed the jury over defendant's objections. Clearly, under these circumstances, the defendant did not waive his right to double jeopardy protections.

WHEREFORE, respondent respectfully requests that the U.S. Supreme Court deny certiorari in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of the foregoing Brief were sent by Ordinary U.S. Mail this 18th day of February, 1994, to Jonathan E. Rosenbaum, Assistant Lorain County Prosecuting Attorney, 226 Middle Avenue, Elyria, Ohio 44035.

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